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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS RAMIREZ,

Defendant and Appellant.

B236452

(Los Angeles County
Super. Ct. No. VA115337)

APPEAL from a judgment of the Superior Court of Los Angeles County. John A. Torribio, Judge. Affirmed.

William Hassler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

Carlos Ramirez appeals from a judgment entered after a jury convicted him of willful, deliberate and premeditated attempted murder, shooting at an occupied motor vehicle and possession of a firearm by a felon. In connection with the attempted murder and shooting convictions, the jury found firearm and gang enhancement allegations to be true. The trial court sentenced Ramirez to 40 years to life in prison.

Ramirez challenges the sufficiency of the evidence supporting his convictions, arguing there is insufficient evidence he was the shooter. He also challenges the sufficiency of the evidence supporting the gang enhancement allegations. Ramirez further contends the trial court erred when it allowed the gang expert to base his opinion the shooting was committed for the benefit of the gang on the prosecutor's hypothetical question which tracked the facts of the shooting. We affirm.

BACKGROUND

Prosecution Case

On February 13, 2009, 14-year-old Leanne M. had a Valentine's Day party at her house on Juarez Avenue in Whittier. Between 100 and 200 people attended the party, which was held in Leanne's backyard. The party ended before midnight. Around that time, Leanne and her friend, Corrina C., walked to the nearby corner of Nobles and Esperanza. The area where Leanne lived was territory claimed by the Jim Town criminal street gang.

As Leanne and Corrina were walking to Nobles and Esperanza, Leanne saw a silver car drive from Juarez Avenue onto Nobles. The car stopped and the people inside the car engaged in a "conflict" with two men standing in the street. Leanne recognized the men standing on the passenger side of the car as her cousin, Freddie Moreno, and his friend, Dayvon Brazile. Brazile is a member of the Jim Town street gang and Moreno is an associate member. Leanne did not know the men in the silver car, although they had attended the party at her home.

Spencer Estrada was driving the silver car. He had four passengers, including attempted murder victim, Danny Rodriguez, who was seated in the middle of the back seat. Joseph Garcia was seated in the back seat on the passenger side. Estrada stopped

the car because Garcia called out the window to some “girls” he saw. Garcia opened the car door to talk to them. When the girls walked away, Moreno (Leanne’s cousin) and Brazile approached the car.

According to Estrada, Moreno and Brazile asked the men in the car “where [they] were from.” Estrada understood this to mean, “what gang are you from?” None of the men in the car belonged to a gang. Garcia, responded, ““We ain’t from no where [sic].”” Estrada said, ““Man this is whack. Let’s get out of here.”” As Garcia closed the car door, Moreno punched it. Estrada drove away. Brazile chased after the car.

Estrada turned off Nobles and drove onto Esperanza Avenue. As Estrada’s car approached 5729 Esperanza, Estrada saw a group of people standing outside around a “burning barrel,” containing wooden logs. According to Detective Hank Ortega, the investigating officer on this case, 5729 Esperanza Avenue was the Jim Town gang’s “headquarters.” Leanne saw Moreno and Brazile run to 5729 Esperanza. Leanne was familiar with this house because she had friends who lived there and she “used to hang out there.”

Estrada came to a dead end on Esperanza Avenue and had to make a U-turn to leave the area. As the silver car was driving back down Esperanza, a man jumped in front of the car and motioned for Estrada to stop. Estrada accelerated and drove around the man. Someone threw a burning log which hit the car causing damage.

As Estrada drove away, he heard three or four gunshots coming from behind the car.¹ Garcia indicated Danny Rodriguez had been hit. Estrada drove until he saw a patrol car. He pulled over and the deputy called for an ambulance. According to Rodriguez, the bullet “shattered a big piece of [his] skull.” Rodriguez stayed in the hospital for three weeks.

Detective Ortega arrived at the scene of the shooting at about 2:30 a.m. on February 14, 2009. He had a “brief” conversation with Leanne in the presence of her grandmother. According to Ortega, Leanne “seemed wide awake.” She did not appear to

¹ Leanne testified she heard seven gunshots.

be intoxicated. Ortega asked Leanne to provide a list of names of people who had attended her party, and Leanne complied. Corrina C. was on the list. Leanne did not indicate she had seen the shooting or knew the identity of the shooter. Ortega did not feel he was able to have a “frank” discussion with Leanne because Leanne’s grandmother interrupted, answered questions for Leanne and “stepped between” Leanne and Ortega.

Deputies recovered beer bottles and cans from the area outside 5729 Esperanza Avenue. Defendant Ramirez’s fingerprint was found on one of the bottles.

On March 6, 2009, Detective Ortega went to Leanne’s high school and interviewed her. There were other people in the room. Leanne appeared “distracted” as she looked around the room. Leanne told Ortega “she had heard the shooter was a person named Carlos.”

On May 27, 2009, Detective Ortega was able to have “a more extensive” and “a more private conversation” with Leanne. Ortega showed Leanne a photograph of defendant Carlos Ramirez and Leanne identified him as the shooter. Leanne said she had seen Ramirez at 5729 Esperanza Avenue on occasions prior to the shooting.

On August 29, 2009, Detective Ortega interviewed Leanne at the sheriff’s station. Leanne’s mother accompanied her to the interview. Leanne provided additional details about the shooting and identified Ramirez as the shooter in a photo lineup. Leanne explained one of the reasons she recognized Ramirez was because of his size. Leanne told Ortega, “I know for a fact no one is as big as him.”² Leanne and her mother told Ortega they did not want Leanne to testify about the shooting.

Leanne testified at the preliminary hearing and identified Ramirez as the shooter.³ She explained Ramirez was across the street from her when he fired shots at the silver car. She could see the front of his body. She saw a flash and heard the sound of gunshots

² When Detective Ortega interviewed Corrina C. on May 27, 2009, she told him the shooter was “an older, chunky, male Hispanic.” At trial, Corrina denied knowing about the shooting and stated she did not tell Ortega anything about it.

³ The prosecutor read portions of Leanne’s preliminary hearing testimony into the record at trial.

coming from the location where Ramirez was standing. Leanne saw only Ramirez standing in that location.

When Leanne testified at trial, she refused to identify Ramirez, but she acknowledged she told Detective Ortega on multiple occasions and testified at the preliminary hearing that Ramirez was the shooter. Leanne stated she was “[v]ery positive” when she identified Ramirez at the preliminary hearing.

Leanne explained at trial why she was reluctant to identify Ramirez. Shortly before trial, her mother’s and grandmother’s cars were vandalized. Her aunt instructed her to deny at trial she knew the identity of the shooter. Her aunt told Leanne that her cousins—Jim Town gang members—would face retaliation if she identified Ramirez at trial.

At trial, Detective Ortega, a gang expert, gave his opinion the shooting was “committed for the benefit of, at the direction and association of the Jim Town street gang.” When he gave this opinion, Detective Ortega was responding to a hypothetical question from the prosecutor, which tracked the facts of the shooting. Detective Ortega explained gang members “might approach somebody and say, where you from” if they see someone they believe is a threat to their neighborhood. It is common for gang members to protect their territory by using violence. If an individual responds to the query “where you from” by saying “this is whack,” that person has disrespected members and associates of Jim Town in their neighborhood. According to Ortega, under such circumstances, members and associates of Jim Town “have to confront the disrespecting party.” Ortega identified Ramirez as an associate of the Jim Town gang.

Defense Case

Lauren and Amber Ventura testified on behalf of Ramirez. They lived at 5729 Esperanza Avenue. Their stepfather was a Jim Town gang member. Lauren’s boyfriend was Dayvon Brazile, a Jim Town gang member. Ramirez was a family friend of Lauren and Amber.

Lauren helped Leanne with the Valentine’s Day party. Both Lauren and Amber attended the party. They testified they saw Leanne drinking alcoholic beverages at the

party and believed she was drunk. They also stated Leanne was vomiting in the backyard at the end of the party. Leanne's aunt, Martha Ortega, testified Leanne was in the backyard of her house on Juarez Avenue (not at the corner of Nobles and Esperanza) at the time of the shooting.⁴

Lauren and Amber were in their house at 5729 Esperanza Avenue when they heard the gunshots. They testified they saw Ramirez asleep on a couch inside their house at the time of the shooting. When a defense investigator interviewed them, they did not tell the investigator Ramirez was asleep inside their house at the time of the shooting. Rose Perez, who owned and lived at 5729 Esperanza Avenue, also testified Ramirez was asleep on the couch at the time of the shooting. The first time she provided this information to defense counsel was the day she testified at trial.

Gordon Perez testified he is a Jim Town gang member, but Ramirez is not a Jim Town member. Ramirez was one of Perez's best friends. Perez had known Ramirez for about 40 years.

Verdicts and Sentence

The jury found Ramirez guilty of willful, deliberate and premeditated attempted murder (Pen. Code,⁵ §§ 187, subd. (a) & 664; count 1), shooting at an occupied motor vehicle (§ 246; count 2) and possession of a firearm by a felon (former § 12021, subd. (a)(1); count 3). In connection with counts 1 and 2, the jury found true the special allegations that Ramirez personally and intentionally discharged a firearm causing great bodily injury to Rodriguez (§ 12022.53, subds. (b)-(d)), and committed the offenses "for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members" (§ 186.22, subd. (b)(1)(C)).

⁴ When she testified at trial, Martha Ortega denied telling Leanne to say she did not remember anything about the shooting. She also denied telling Leanne her cousins would face retaliation if she testified about the shooting.

⁵ Further statutory references are to the Penal Code.

The trial court sentenced Ramirez to 40 years to life in prison: 15 years to life for attempted murder plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d). The court stayed the sentence on count 2 and imposed a concurrent two-year term on count 3.

DISCUSSION

I. Sufficiency of Evidence

Ramirez challenges the sufficiency of the evidence supporting his convictions and the gang enhancement allegations.

In reviewing a challenge to the sufficiency of the evidence, “the reviewing court’s task is to determine whether, in light of the whole record viewed in the light most favorable to the prosecution, a rational trier of fact could have found the elements of the crime beyond a reasonable doubt.” (*People v. Felix* (2009) 172 Cal.App.4th 1618, 1624.) We ““must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]” [Citations.]” (*People v. Smith* (2005) 37 Cal.4th 733, 739.) “The credibility of witnesses and the weight accorded the evidence are matters within the province of the trier of fact. [Citations.]” (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1207.) ““An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise. [Citation.]’ [Citation.]” (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419.) “Reversal on this ground is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Substantial evidence must be reasonable, credible and of solid value. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329.) Although an appellate court must draw all reasonable inferences in support of the judgment, the court may not rely on speculation as support for the judgment. (*People v. Waidla* (2000) 22 Cal.4th 690, 735 [“speculation is not evidence, less still substantial evidence”].)

A. Ramirez's identity as shooter

Ramirez argues there is insufficient evidence he was the shooter and, therefore, insufficient evidence he committed a crime on February 14, 2009. As Ramirez states it, "The only issue before the jury was whether appellant was the man who fired the shots that hit Mr. Rodri[g]uez, as Leanne claimed and Amber, Lauren and Rose Perez denied." Ramirez does not challenge the sufficiency of the evidence supporting any of the other elements of the offenses.

Leanne made multiple out-of-court identifications of Ramirez as the shooter. She also made an in-court identification of Ramirez as the shooter at the preliminary hearing. Substantial evidence presented at trial demonstrated Leanne was familiar with Ramirez before the shooting because she had seen him on prior occasions at her friends' house at 5729 Esperanza Avenue. Substantial evidence also demonstrated Leanne was standing across the street from Ramirez and was able to see the front of his body at the time he fired the shots.

As Ramirez acknowledges, "Identification of the defendant by a single eyewitness may be sufficient to prove the defendant's identity as the perpetrator of a crime. [Citation.] Moreover, a testifying witness's out-of-court identification is probative for that purpose and can, by itself, be sufficient evidence of the defendant's guilt even if the witness does not confirm it in court. [Citations.] Indeed, 'an out-of-court identification generally has greater probative value than an in-court identification, even when the identifying witness does not confirm the out-of-court identification: "[T]he [out-of-court] identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind. [Citations.] . . .'" [Citations].'" [Citation.]" (*People v. Boyer* (2006) 38 Cal.4th 412, 480.) Ramirez had an opportunity to cross-examine Leanne about her multiple identifications of him as the shooter. (*Id.* at 481.) It was for the jury to decide whether it believed Leanne's testimony about the shooting or that of Lauren, Amber and Rose Perez.

Ramirez asserts Leanne's testimony would not constitute substantial evidence of his identity as the shooter unless it was corroborated by "independent evidence." This is not the rule. (See Evid. Code, § 411 ["Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact"].)

Substantial evidence presented at trial demonstrated Ramirez was the man who shot Danny Rodriguez and committed the charged offenses.

B. Gang enhancement allegations

Substantial evidence presented at trial demonstrated Estrada drove into Jim Town territory. Jim Town gang members were gathered outside the Jim Town "headquarters" at 5729 Esperanza Avenue. Brazile, a Jim Town gang member, and Moreno, a Jim Town associate, asked Estrada and his friends where they were from. Estrada disrespected them by responding, "this is whack." Moreno punched Estrada's car. Estrada tried to get away. Brazile chased the moving car. After Estrada made a U-turn at the dead end, someone tried to stop his car. As he evaded the person, a burning log hit his car. Ramirez fired shots at Estrada's car as it sped away. Ramirez is a Jim Town associate who frequented 5729 Esperanza Avenue.

Detective Ortega, a gang expert, gave his opinion the shooting was "committed for the benefit of, at the direction and association of the Jim Town street gang." As Ramirez acknowledges, "[t]o prove a gang allegation, an expert witness may testify about criminal street gangs" (*People v. Romero* (2006) 140 Cal.App.4th 15, 18), and the relationship between the gang and the crimes. (*People v. Abillar* (2010) 51 Cal.4th 47, 60-61.)

Substantial evidence presented at trial demonstrates Ramirez committed the offenses charged in counts 1 and 2 for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members. Estrada and his friends drove into Jim Town gang territory and disrespected Jim Town gang members and associates. As they tried to escape the gang-related confrontation, Ramirez fired shots at the car.

II. Propriety of Gang Expert's Opinion Based on Hypothetical

Ramirez contends the “trial court committed reversible error, and violated appellant’s constitutional rights to due process and a fair trial, by allowing the prosecutor to elicit Det. Ortega’s opinion that the charged crime was ‘gang-related’ using hypothetical questions that precisely tracked the alleged facts of the charged crime. That procedure improperly allowed Det. Ortega to express his opinion on the ultimate issue in the case under the guise of responding to a hypothetical question. [Citation.]”

The California Supreme Court rejected this same contention in *People v. Xue Vang* (2011) 52 Cal.4th 1038, 1041. In that case, “An expert witness testified about whether a crime was gang related. The Court of Appeal held that the trial court erred in permitting the expert to respond to hypothetical questions the prosecutor asked because the questions closely tracked the evidence in a manner that was only thinly disguised.” (*Ibid.*) The Supreme Court concluded the trial court did not err, explaining, “It is required, not prohibited, that hypothetical questions be based on the evidence. The questioner is not required to disguise the fact the questions are based on that evidence.” (*Ibid.*) We are bound by our high court’s decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Ramirez acknowledges the Supreme Court has ruled against him on this issue and explains he “only raises the issue to preserve it for federal review.”

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANAY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.